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IN THE

Supreme Court of the United States

October Term, 1957

No. 397

HAROLD ROBERT LOVE,
Petitioner

v.

ARTHUR W. NEWBURY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harold Robert Love, petitioner herein, prays that a writ of certiorari issue to review the judgment which the United States Court of Appeals for the District of Columbia entered in the above entitled case on 28 February 1957.

OPINIONS BELOW

This case was tried to a jury in the United States District Court in the District of Columbia. The jury returned a verdict in favor of the petitioner (who was the plaintiff in the trial court) and judgment thereon was duly entered. Since there were no motions or requests of the defendant to be disposed of, there was no occasion for, and no opinion was filed in the District Court

below. The present respondent appealed from that judgment.

The opinion of the Court of Appeals (App. A, pp. 20-21), which reversed the trial court and ordered dismissal of the complaint is reported at —— US App DC ——, 242 F2d 372.

JURISDICTION

The judgment of the Court of Appeals was entered on 28 February 1957 (App. A, pp. 22-23). The Court of Appeals granted leave to Mr. Love to petition for a rehearing after the normal fifteen day period had expired. Rehearing was requested and, on 17 April 1957, was denied (App. A, p. 23). By order of Mr. Justice Black dated 16 July 1957 (App. B, p. 24), the time for filing petition for writ of certiorari was extended to and including 20 August 1957; and, later extended until 23 August 1957, (App. B, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

The question presented is whether, in the face of express reliance by a plaintiff-appellee on (a) the Seventh Amendment and (b) Rule 50 of the Federal Rules of Civil Procedure, a United States Court of Appeals has the power to reverse a judgment which rests upon a jury verdict in a common law action (slander) and order final dismissal of the claim because it appears to that court that the evidence justified entry of a directed verdict in favor of defendant, when: (1) no motion for a directed verdict was made at the conclusion of all the evidence; (2) the defendant-appellant was "satisfied" with the instructions given to the jury by the trial judge; (3) no motion for judgment notwithstanding the verdict was made; and, (4) no motion for a new trial was requested.

CONSTITUTIONAL PROVISION AND COURT RULE INVOLVED

The Seventh Amendment to the Constitution of the United States provides:—

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 50 of the Federal Rules of Civil Procedure, 28 USCA following 2072, is entitled "Motion for Directed Verdict" and subsection (b) thereof reads as follows:—

> "*Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT

The petitioner, Harold Robert Love, brought this suit in the United States District Court for the District of Columbia against the respondent, Arthur W. Newbury, to recover damages for defamation of character by reason of declarations made by Mr. Newbury over a period of time.

Jurisdiction of the trial court was based on the fact that (1) the claim was *in personam* and transitory in nature; (2) the amount in controversy was more than $3,000 exclusive of interest and costs; and, (3) personal service was obtained on the defendant.

The complaint was drawn by the petitioner *pro se*. Each and every one of the many matters referred to in the several paragraphs and sub-paragraphs of the complaint were removed from the case by the trial judge at the conclusion of plaintiff's case. However, in the opening statement made by Mr. Love's attorney in addressing the jury, it was stated that the plaintiff would prove that Mr. Newbury had slandered the plaintiff in a telephone conversation with a Mr. Maginnis less than one year prior to the filing of suit. Counsel for Mr. Newbury informed the jury in his opening statement that Mr. Newbury would prove that no such conversation took place and, at least, not within the one year period of limitation.

The only issue which the trial judge refused to dispose of upon Mr. Newbury's mid-trial motion was the claim for slander in the telephone conversation which, according to Mr. Love's testimony, had taken place between the defendant and Mr. Maginnis. After his motion for a directed verdict was denied, Mr. Newbury presented his own evidence. Making it clear that he did not rely upon either privilege or truth as a defense, Mr. Newbury testified to the jury that he had never had any conversation with Mr. Maginnis regarding Mr. Love.

The defendant did not ask for a directed verdict when all of the evidence was in, and the trial judge did not deny any instructions requested by the defendant, nor did the trial judge give any instructions which were objected to by the defendant. Under instructions which "satisfied" the defendant, the case was submitted to the jury on the single issue as to whether or not Mr. Newbury had defamed Mr. Love in a telephone conversation within one year prior to the bringing of suit. The jury found in favor of Mr. Love in the amount of $100 and judgment on that verdict was duly entered in his favor. The defendant did not move for judgment notwithstanding the verdict, nor did he move for a new trial.

In his "Brief for Appellant" in the Court of Appeals, the present respondent (Mr. Newbury) assigned error to the trial court as follows:—

> "The district court erred in failing to direct a verdict for appellant on the ground that appellant's statements were either absolutely or qualifiedly privileged."

The record in this case, however, establishes beyond peradventure of doubt that:—

(1) The only motion made by Mr. Newbury for a directed verdict was the motion made upon the conclusion of plaintiff's case-in-chief. Since Mr. Newbury thereafter presented evidence on his own behalf, his right to object to the denial of his mid-trial motion was waived. **Robertson v. Perkins** (1889) 128 US 233; **Wilson v. Haley Live Stock Co.** (1894) 153 US 39; **Hansen v. Boyd** (1896) 161 US 397; and, the rule is not otherwise howsoever the mid-trial attack be made, **Pomeroy v. State Bank** (1863) 1 Wall 592; **McCabe & S. Constr. Co. v. Wilson** (1908) 209 US 275. This undisputed rule is also stated in the most frequently cited case of the Court of Appeals below, **Blake v. Trainer** (1945) 79 US App DC 360, 363 (footnote 2), 148 F2d 10;

(2) Mr. Newbury did not defend on the grounds of privilege. According to the sworn testimony of Mr. Newbury himself, the statements charged to him could not have been absolutely privileged since long before the alleged conversation with Mr. Maginnis, Mr. Newbury had been instructed to pass on to the Judge Advocate General any and all inquiries respecting Mr. Love;

(3) Counsel for Mr. Newbury elected to defend upon the factual defense of "no statement" rather than to rely upon the defense of privilege or the truth. This election was consistently maintained by Mr. Newbury's counsel from the initial moments of the case down to and including the final argument to the jury. Thus, in his opening statement to the jury, Mr. Newbury's attorney, referring to the alleged Newbury-Maginnis telephone conversation, promised that the defense would "show to you that simply is not the fact; I will say no more than that, it is not so and we will show you that it is not so." Later, in his mid-trial motion for a directed verdict, the following colloquy took place between the trial judge and counsel for Mr. Newbury:

> "THE COURT: Do I understand that the defendant concedes there was a telephone conversation?
>
> "MR. TOOMEY: No, we do not . . . We do not concede it for a moment . . ." (JA-55).

In his argument to the jury, counsel for Mr. Newbury said:—

> "MR. TOOMEY: . . . [T]here remains for your consideration. . . *only one question*, whether or not Mr. Newbury made a statement over the telephone to a Mr. Maginnis which was defamatory of Mr. Love.
>
> • • • •
>
> So that now *the only question* for your consideration, factually, is whether or not there was such a telephone conversation . . . Mr. Love says that

the call was made; Mr. Newbury says no, it wasn't . . .

• • • •

. . . [Y]ou should rather believe the defendant's version of the story, to wit, that *there simply was no such conversation.*" (JA-79, 81. Emphasis added).

Further, the trial judge instructed the jury, in accordance with the theory on which defendant had tried the case, and quite clearly, as follows:—

" . . . [T]he plaintiff must prove by a fair preponderance of the evidence that each and all of the essential allegations of his claim are true: First, that the defendant, Mr. Newbury, made the defamatory statement alleged over the telephone; and Second, that damages resulted therefrom.

"Now, we come to the specific issue in this case. I have already told you what, according to my recollection, is the specific statement relied upon here, the statement allegedly made over the telephone; and I have also told you that the defendant, Mr. Newbury, denies that that statement was made. Now, it is for you to determine whether the statement was or was not made. I do not know what your decision will be, but you are to determine what the truth is . . . [JA-85, 86].

• • • •

"In law, there may be grounds for justifying the making of a defamatory statement, such as the truth of the statement made. But the defendant here is not seeking to justify the making of the statement but, on the contrary, he says the statement was not made by him. The burden is not on the defendant to show that he did not make the statement . . .

"If you find from the evidence that the defendant did not make the defamatory statement over the telephone, or if you find the evidence equally balanced on the question of whether the defendant made or did not make the statement, then your finding would be for the defendant, as the plaintiff would have failed to carry his burden of proof.

> "If, however, you find by the weight of the evidence that the defendant, Mr. Newbury, made the defamatory statement over the telephone, then the plaintiff would be entitled to your verdict." (JA-87).

After the foregoing instructions were given to the jury, Mr. Newbury's attorney stated to the trial judge "We are satisfied, Your Honor." (JA-90).

Although the record clearly establishes the fact that Mr. Newbury declined to defend upon the ground of privilege and instead chose to defend one step ahead of that defense, i.e., by denying the alleged defamatory remarks—the Court of Appeals in its *per curiam* ruling declared that:—

> "[Mr. Newbury] contended below that the statements complained of were not actionable, even if defamatory, because (1) he made them in connection with his official duties; and (2) he made them in reply to an inquiry from appellee's attorney and his reply was not malicious and did not go beyond the inquiry."

As to item "(1)" above, the transcript of the proceedings in the trial court makes it clear beyond argument that the Court of Appeals erred in saying that Mr. Newbury contended that he had made the statements complained of "in connection with his official duties." Thus, at pages 66, 67 of the Joint Appendix it appears that Mr. Newbury swore under oath that prior to the date of the alleged conversation with Mr. Maginnis, his own superiors had given him instructions to pass on all calls concerning Mr. Love to higher authority.

As to the foregoing item "(2)" of the Court of Appeals recapitulation, the actual record establishes beyond cavil that Mr. Newbury did *not* contend that "his reply was not malicious and did not go beyond the inquiry." Thus, at page 161 of the Record, the following conversation between counsel is reported:—

"MR. O'NEALL: I object to 4 [Defendant's Requested Instruction No. 4].

"MR. TOOMEY: Yes, as it is worded. I agree with your objection, probably. We would have to strike the language that says 'and that Mr. Newbury, while actuated by malice' because this thing [Defendant's Requested Instruction No. 4] was predicated, when I drafted it, upon the theory of a qualified privilege."

REASON FOR GRANTING THE WRIT

The Decision of The Court of Appeals Disregards Established Limits On Its Power As Defined By Decisions of This Court and Deprives Petitioner of His Seventh Amendment Jury Trial Right

This is not a case in which a disappointed litigant begs a second chance of fortune in the hope that a re-evaluation at new hands will produce a different result; for, to the present moment, there has been no lawful appellate review in this case—at least, not as that term is defined in Federal jurisprudence. The Court of Appeals below did not even purport to respect the limits of its permitted powers as an appellate tribunal. Even though its appellant had not asked the trial court for a directed verdict, had not objected to any jury instructions, had not asked for judgment notwithstanding the verdict, and had not even asked for a new trial, the Court of Appeals below made a de novo determination as to the sufficiency of the evidence on which the trial court's judgment in petitioner's favor was based. The Court of Appeals was not free to re-examine those facts in any other manner "than according to the rules of the common law" because the judgment in the instant case rested upon a jury verdict in a common law action and was entitled to the full protection of the Seventh Amendment; and, at common law the absence of such trial court motions as above enumerated precluded appellate review of the evidence.

For peculiar reason, and with peculiar force, the issuance of the writ is recommended by the facts in this case. The reason is, simply, that the right on which petitioner's case depends is the prohibition against free-wheeling appellate review which is specified in the Seventh Amendment; and, since this Court is the only tribunal which can enforce that right and instruct the Court of Appeals as to the constitutional limits of its power to re-examine evidence on appeal, the proof that such a right has been violated must necessarily justify with peculiar force, the issuance of the writ if the Seventh Amendment is to be preserved—for there is no other recourse. In this case, proof that the Amendment was violated is more than ample.

Petitioner cannot pretend that the question presented by this petition is a new one. This Court has long made it clear that the Seventh Amendment must be respected; that the right to a jury trial must not be curtailed; and, that the United States Courts of Appeals are not at liberty to re-examine facts in cases within reach of the Seventh Amendment except in accordance with the rules of the common law. The decision of the Court of Appeals below in this case flys into the teeth of this whole fabric of law. Petitioner respectfully urges the importance of this Court's rulings, and urges that unless this Court's declarations on those rights are made effective, the Seventh Amendment will disappear.

Possibly the fullest content ever given to the Seventh Amendment by this Court is found in the majority opinion in **Slocum v. New York Life Ins. Co.** (1913) 228 US 364. Certainly, that vigorously contested decision teaches much as to the possible reach of the Seventh Amendment. It may be that **Slocum** has been limited by this Court's decision in **Baltimore & C. Line v. Redman** (1935) 295 US 654; but, although it may be conceded that **Slocum** was limited by **Redman**, the efficacy of the

Seventh Amendment under **Redman** and later decisions is still a stringent limitation on the powers of the United States Courts of Appeals. Certainly, neither the dissenters in **Slocum**, nor the undivided court in **Redman**, would have sanctioned such appellate review as was practised by the Court of Appeals below in this case. Thus, in the present case the court below re-examined the sufficiency of the evidence in a common law action which had been tried to a jury, even though the appellant, at whose behest the re-examination was conducted, had not asked the trial court (1) for a directed verdict, nor for either (2) a judgment notwithstanding the verdict, or (3) a new trial, or both. The appellate court nevertheless proceeded to re-examine the evidence and concluded that the trial judge should have dismissed the claim on the ground that the statements charged to Mr. Newbury were absolutely privileged.

Since Mr. Newbury did not ask for a directed verdict when all of the evidence was in; since he did not object to any jury instructions given or refused; since he did not move for judgment notwithstanding the verdict; and, since he did not move for a new trial—the Court of Appeals below was absolutely forbidden, by the terms of the Seventh Amendment, as well as numerous decisions of this Court, from making any re-examination of the evidence to test the sufficiency of the factual basis on which petitioner's judgment rested. Needless to say, the court below could have reviewed any ruling of the trial court which prejudiced the outcome of the trial; for example, if evidence had been improperly admitted, or if there had been comparable error relating to the procedure at the trial, such injustices could have been corrected irrespective of whether the losing party made any or all of the three motions above listed which are, after all prerequisites to judicial review only when any question as to the sufficiency of the evidence is raised.

But, in the court below, the naked question was whether or not there was sufficient evidence to support the judgment. Since the Court of Apeals below had no power to examine that question, the appeal had either to be dismissed or the judgment affirmed.

The Court of Appeals below did not even acknowledge the existence of the Seventh Amendment or any of the limitations upon its power of review which have been stated so clearly by this Court. True, the failure of a court to make formal obeisance to well known rules of law is not proof positive of error. But, when an appellee defends squarely upon constitutional right and prior decisions of this Court; and, when, as here, that right is clear, the failure of the intermediate appellate court to acknowledge the existence or nature of the claimed right is most significant. To have acknowledged the right which Mr. Love invoked would have made it impossible for the Court of Appeals below to have reversed.

Even if the constitutional issue were not present, the decision of the court below would still be so woefully in error and so contrary to the settled course of judicial proceedings as to justify the issuance of the writ. Thus, the reversal ordered by the Court of Appeals rests upon conclusions that could be valid only if factual support in the record could be found. The factual support is not present in the record for the simple reason that the issues pertinent thereto were not tried in the court below. The absence of fact on those issues arises from the simple fact that the defendant chose not to predicate his defense upon privilege.

It was entirely improper for the Court of Appeals below to predicate its reversal upon grounds which were not relied upon in the trial court. Even without recourse to the limitations imposed by the Seventh Amendment, the decision of the court below is clearly erroneous. A reversal such as the one entered by the court below rep-

resents such a departure from the settled course of judicial proceedings as to require correction by this Court as an incident to its general supervisory jurisdiction, for the decision of the Court of Appeals below is categorically impeached by the record in this case.

As was pointed out to the Court of Appeals below, if Mr. Newbury had chosen to rely upon the defense of privilege—either absolute or qualified—either or both of those defenses would have permitted certain factual issues to have been submitted to the jury. Thus, the question as to whether the alleged statements had been made on a privileged occasion or under conditions giving an absolute privilege depended upon questions of fact as to which appropriate facts issues could have been framed if there had been a defense of privilege. As has already been pointed out, however, Mr. Newbury could not have relied on the defense of absolute privilege for he had been instructed to pass on to other officials all inquiries respecting Mr. Love and not to answer them himself. The question as to whether there was malice in the statements made by Mr. Newbury would have involved fact questions which would have been material if, and only if, Mr. Newbury had chosen to defend on the grounds of a qualified privilege. The factual question as to whether or not Mr. Newbury's statements went beyond what was necessary to reply to the inquiry made of him was also a fact issue which could have been appropriately framed if the defense of privilege had been invoked. In his Brief for Appellee in the Court of Appeals below, petitioner said:—

> " . . . Each of those contentions, of course, raise factual issues. Each was a suitable question for the jury *if* the defense of privilege was to be interposed. Mr. Love would have been glad to go to the jury on any or all of those factual issues. However, as both his Answer and his opening statement to the jury—indeed, the whole record—makes clear, privilege

was not the defense upon which Mr. Newbury relied. He defended one step ahead of privilege. He denied making the statements. Having elected *in his opening statement* to defend at the very threshold of privilege, Mr. Newbury released Mr. Love from any obligation to negate such issues as relate to the defense of privilege; i.e., the nature of the occasion on which the statements were made, the question of malice, the question as to the relation between the scope of the inquiry and the extent of the answer, the issue of truth, reasonableness, or alternatively the performance of an official duty. Mr. Newbury—wisely or unwisely—went to the jury on factual issues that cut off any issue related to privilege. He cannot now be heard to complain because he lost.

"There is no obligation upon a litigant to plead privilege as a defense to a suit for slander. If a litigant chooses to rely exclusively upon the factual defense that he did not make any statements concerning the plaintiff, he is free to do so. And, if a litigant chooses so to defend, this Court of Appeals has neither right nor power to retry that case for him or to make it appear that he defended on grounds which he did not defend upon."

Appropriate decisions of this Court, as well as the Seventh Amendment, were expressly relied upon in the court below and cited to that court by the petitioner. **Dimick v. Schiedt** (1935) 293 US 474, 487; **Baltimore & C. Line v. Redman** (1935) 295 US 654, 657; **Rochin v. California** (1952) 342 US 165, 169, 170; **Montgomery Ward & Co. v. Duncan** (1940) 311 US 242; and **Johnson v. N.Y.N.H. & H. Ry. Co.** (1952) 344 US 48, were extensively quoted. Further as being almost precisely in point, petitioner cited and quoted the following excerpt from the opinion of Judge Swann in **Flint v. Youngstown Sheet & Tube Co.** (2nd Cir-1944) 143 F2d 923, 924, which was later paraphrased by the Court of Appeals below in **Ersler v. Schneider Corp.** (1951) 88 US App DC 371, 188 F2d 1022:—

> "• • • . If the plaintiffs [here, read 'defendant'] wished to assert that there was no case to go to the jury, they were bound to move for a directed verdict. They may not take a verdict and then complain that it is not what they expected; or at least their right to complain ends with the trial judge. [Citation]. Under federal practice an appellate court will not consider the question of the sufficiency of the evidence in the absence of a request for an instructed verdict. **Hartford Life & Annuity Ins. Co. v. Unsell,** 144 US 439, . . . • • • ."

In **Hartford, etc. v. Unsell,** the headnote on this point reads as follows:—

> "If, in a case where the evidence warranted a request for a peremptory instruction to find for the defendant, no request for such instruction was made, it cannot be made a ground for reversal that the issues of fact were submitted to the jury."

The foregoing statement of the law has never been questioned sofar as petitioner can ascertain after diligent research and, quite to the contrary, it appears that this rule has been consistently reaffirmed in most of the circuits of the United States Courts of Appeals. In **Strika v. Netherlands Ministry of Traffic** (2nd Cir-1950) 185 F2d 555, 556, Judge Learned Hand commented on a similar situation, and in these words:—

> "• • • . [T]he first question is whether the answer of the jury shall stand that the defendant was not guilty of negligence; and that depends upon whether the evidence of the ship's negligence was so one-sided that the judge should have directed a verdict in favor of the plaintiff. That is, however, not before us, because the plaintiff did not ask for a direction on the issue and therefore may not raise it on appeal. • • • ."

At the page cited, Judge Hand cites numerous cases in support of the foregoing point; and to the same effect see **Edward v. Steinns** (4th Cir-1953) 207 F2d 734, citing several additional cases at page 736.

In short, petitioner did all that the law would permit him to do. But it was to no avail. The court below chose to disregard petitioner's rights under the Seventh Amendment and chose to turn a deaf ear to the decisions of this Court. Thus, notwithstanding the indisputable facts (a) that Mr. Newbury went to the jury on a simple fact issue and (b) under jury instructions which satisfied him, (c) without asking for a directed verdict when all of the evidence was in, and (d) without asking for a judgment notwithstanding the verdict after he learned of the jury verdict, and (e) without asking for a new trial, the Court of Appeals below undertook to rule that the trial court should have entered a "judgment of dismissal" for the reason that the evidence showed that the statements charged to Mr. Newbury "were made in the proper performance of his official duties and [were], therefore, absolutely privileged."

It will little avail for this Court to lay down rules which *may* serve as guides to the United States Courts of Appeals in the performance and extent of their appellate function. The rulings of this Court must be binding upon those courts if the high purpose of this Court is to be made effective. Clearly, the Court of Appeals below has disregarded the rulings of this Court and it has done so to the grievous prejudice of this petitioner. Clearly, this Court should grant the present writ.

It will be remembered that as the appellant in the court below, the respondent demanded reversal on the ground that the trial court erred "in failing to direct a verdict for appellant on the ground that appellant's statements were either absolutely or qualifiedly privileged." No other error was assigned. No other error was passed on by the court below.

The petitioner, in response to that assignment of error, contended in the court below (1) that due to respondent's failure to ask for a directed verdict at the close of all

the evidence, he was precluded from asking for judgment notwithstanding the verdict or for a new trial; (2) that by reason of the fact that respondent had failed to ask the trial court for judgment notwithstanding the verdict or for a new trial as permitted by Rule 50 of the Federal Rules of Civil Procedure; and (3) in view of the terms of the Seventh Amendment, restricting the terms upon which facts tried to a jury could be re-examined, the Court of Appeals was without power to reverse on the theory advanced by respondent. Thus, in his Brief for Appellee, the petitioner's counter-statement of the question is in these words:—

> "In appellee's opinion, the question presented by this appeal is whether this Court can review a District Court judgment which rests on a jury verdict in a common law action when (1) no request for a directed verdict was made at the conclusion of all of the evidence, (2) no objection was made to any jury instruction given (or refused) by the trial judge, (3) no motion for a judgment n.o.v. was made, and (4) no new trial was requested."

The Court of Appeals ignored the basic question before it and reversed the trial court and ordered the complaint dismissed on the ground that "appellant's [respondent's] statements were made in the proper performance of his official duties and [were], therefore, absolutely privileged." The "statements" referred to in that ruling were those which, according to petitioner, had been made by the respondent in a 1952 telephone conversation with a Mr. Maginnis. The Court of Appeals to the contrary notwithstanding, the respondent did *not* (and, indeed, *could not*) claim that it was within the proper performance of his official duties for him to have made those statements. Thus, in presenting his own case, the respondent on direct questioning of his trial attorney, Mr. Toomey testified as follows:—

"MR. TOOMEY: Did you have such a conversation [i.e., the 1952 telephone conversation] with Mr. Maginnis?

"MR. NEWBURY: I did not.

"MR. TOOMEY: How are you so sure that you did not?

"MR. NEWBURY: Well, I have been instructed, after the case had been closed by the Commission, the Civil Service Commission, there were several suits instituted, the files were turned over to the Judge Advocate General of the Army, and *I was instructed to pass on all papers, calls, and so forth, through the Judge Advocate General, therefore, if any calls came or any correspondence came, I definitely sent them to the Judge Advocate General.*" (JA-66, 67. Emphasis added).

It is respectfully submitted that in the face of that statement, the Court of Appeals could not rule that Mr. Newbury was absolutely privileged to comment on Mr. Love when Mr. Maginnis telephoned him.

CONCLUSION

As this Court said in **Tennant v. Peoria & P.U. Ry. Co.** (1944) 321 US 29, 35, when speaking of the right guaranteed by the Seventh Amendment, there is no reason why this Court should abdicate its "duty to protect and guard that right." To deny this writ would be to deny the Seventh Amendment itself, for only the Supreme Court of the United States can enforce the limitations which it imposes on the inferior appellate courts of the Federal judiciary.

By granting this writ, this Court will not only reaffirm its long standing and often invoked determination to protect the right of trial by jury as a basic feature of Federal jurisprudence, **Baylis v. Travelers Ins. Co.** (1884) 113 US 316, 321, but also it will subserve the highest principle that any legal system can purport to accept—

namely, the concept of even-handed justice—for, upon the instant record no one can consider that the Court of Appeals below dealt justly or fairly with this petitioner.

Respectfully submitted,

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[RE-7-1587]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1957

Mr. Joseph Langbart, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney and *Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellant.

Mr. Charles F. O'Neall for appellee.

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: Appellee, discharged from Government employment, consulted an attorney in an effort to obtain reinstatement. The attorney telephoned the appellant, the Government personnel officer involved, and discussed the case with him while appellee listened on an extension. In the course of the conversation, appellant said that appellee "had been fired on charges and that the charges were that [appellee] had taken papers out of the files at Jeffersonville, Indiana, Quartermaster Depot and given them to

Senator Capehart without authority. . . . And that he had been found guilty of that by the Civil Service Commission, and other charges." Based on this matter appellee was awarded a verdict of $100 in his defamation suit.[1] This appeal resulted from the judgment entered on that verdict.

Appellant contended below that the statements complained of were not actionable, even if defamatory, because (1) he made them in connection with his official duties; and (2) he made them in reply to an inquiry from appellee's attorney and his reply was not malicious and did not go beyond the inquiry. *National Disabled Soldiers' League* v. *Haan*, 55 App. D.C. 243, 4 F.2d 436 (1925). The District Court overruled these contentions.

We think it clear that, in the circumstances of this case, appellant's statements were made in the proper performance of his official duties and are, therefore, absolutely privileged. Cf. *Colpoys* v. *Gates*, 73 App.D.C. 193, 118 F.2d 16 (1941). Since a judgment of dismissal should have been entered on this ground,[2] we need not decide any other questions presented.

Reversed and remanded with instructions to dismiss the complaint.

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[1] The suit had been based upon other allegedly defamatory material as well, but those matters were dismissed out of the case and are not here involved.

[2] This defense was adequately, if inartistically, asserted in the District Court.

Filed Feb. 28, 1957. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1957.

C. A. 2375-53

No. 13,245

ARTHUR W. NEWBURY, APPELLANT

v.

HAROLD ROBERT LOVE, APPELLEE

Appeal from the United States District Court
for the District of Columbia.

Before: WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the complaint.

It is further ORDERED by the Court that appellant herein recover from appellee his taxable costs on this appeal and have execution therefor.

Dated: February 28, 1957.

Per Curiam.

Filed Apr. 17, 1957. Joseph W. Stewart, Clerk

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ORDER

Upon consideration of appellee's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 17, 1957

Circuit Judges PRETTYMAN and BURGER did not participate in the foregoing order.

Filed Apr. 17, 1957. Joseph W. Stewart, Clerk

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ORDER

Upon consideration of appellee's petition for a rehearing before the division of this Court deciding this case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 17, 1957

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957.

HAROLD ROBERT LOVE,
Petitioner,

vs.

ARTHUR W. NEWBURY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 20th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of July, 1957.

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 23rd, 1957.

/s/ Hugo L. Black

Associate Justice of the Supreme Court of the United States.

Dated this 20th day of August, 1957